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DEPARTMENT OF STATE

INSTRUCTION

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NO: W-279 January 18, 1962

DEPARTMENT OF STATE A/CDC/MR

SUBJECT: Consular Convention Negotiations

REVIEWED BY

DATE MAY 1962

REF:

TO: The American Embassy,

RDS on XDS TEXT. DATE
TS AUTH. 944-1 REASON(S)
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Reference is made to Embassy Despatches 185 and 204, of August 28 and September 25, 1961, to the Department's Instruction W-170 of October 24, 1961, and to the Embassy's Airgram A-504 of November 29, 1961. Rather than to respond only to the questions propounded in A-504, the Department decided it should make a paragraph by paragraph analysis, with comments in depth, upon the state of the convention as of September 25, 1961, so that the Embassy, in its discretion, could follow the course of action proposed in W-170, or resume negotiations on the long form. FYI, it would have been as time-consuming to respond to the questions of A-504, which underlie the Japanese counter-proposals to the convention as it existed prior to July 17, 1961, as it would to reply in detail on all proposed changes. The delay is regretted. End FYI. For convenience, the Department's comments will be keyed to the draft convention as it appears in the right hand column of Enclosure No. 4 to Despatch No. 185. The absence of comment upon questions or statements set forth in Enclosures 1, 2, and 3 thereof does not signify approval or disapproval of the material therein, but is attributable to a desire to conclude the convention as soon as possible. If further guidance is desired on these peripheral matters, it should be specifically sought. It is believed that the following paragraphs will be sufficient guidance for the Embassy negotiators in their further discussions with the Foreign Office.

Article 1. The Japanese proposed deletion of this article on territorial applicability. This proposal would result in a showing only of where the convention does not apply (through a proposed article in the Protocol) and leave to guess work where it would apply. Article 1 is accepted terminology in many United States treaties and its precision is highly desired. Without being informed of a better reason, the Japanese proposal is not sufficient for the Department to agree to its deletion.

Article 2 (7). No objection to this proposed change of the Japanese negotiators.

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Article 2 (9).

DRAFTED BY:

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L/SFP - Mr. Fender (relative to Article 23 only.)

L/SFP - Mr. Hines (relative to Article 21 and agreed official minutes to Article 23 (2).)

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Article 2 (9). No objection to the deletion of this paragraph.

Article 2 (10). No objection to the proposed change of the Japanese negotiators.

Article 2 (11). No objection to the deletion of this paragraph.

Article 3. See numbered paragraph 8 of the Department's Instruction A-352 of March 25, 1960.

The comment there still stands. It is not desirable, in the United States view, to include a provision to permit a country to open a consulate at any place where a third country has been allowed to do so. Instead, all opening of consular offices should be by agreement between the sending and receiving state. The right to order a consulate to close must not be hampered by a convention. With respect to the Most-Favored-Nation problem, refer to the discussion of Article 5 (3), below.

Article 5 (3). See the Department's previous comment at page 2 of its Instruction A-352 of March 25, 1960, the substance of which may be made available to the Japanese negotiators. The Department's policy on this matter, which is last exemplified by the non use of the provision in the 1951 US-UK Consular Convention, is not flexible.

Article 6 (4). The Department would have no basic objection to this additional paragraph. It might be observed to the Japanese that the same result could be achieved administratively, through failure to recognize or grant the authorization necessary to the functioning of personnel of the sending state.

Article 7 (1). No objection to this proposed change.

Article 8 (3). There is no real ambiguity to this paragraph. The Japanese proposal would mean that the archive documents need not be kept in the consular office, but could be anywhere. Thus, for purposes of evidence in a court proceeding, who is to decide whether a document found outside the consular establishment is to be classified as an archive document and thereby obtain an inviolable status? FYI, perhaps this Japanese proposal is motivated by Article 24 of the Vienna Convention on Diplomatic Relations, which reads as follows: "The archives and documents of the mission shall be inviolable at any time and wherever they may be". End FYI. Accordingly, the Department would not object strenuously to the Japanese proposal if it were clearly made a part of the negotiating history that the burden of proof would be on the sending state to prove to the courts of the receiving state that a document is or is not to be a part of the consular archives, if it is found elsewhere from the consular offices.

Article 8 (4). There is no objection to the two Japanese amendments to this paragraph.

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paragraph.

Article 9 (2). There is no objection to the Japanese amendment to this paragraph.

Article 9 (4). The Department's experience has been that there is not a general understanding in many foreign countries of our desire to obtain due compensation for seized property. The Department would prefer to retain the original language of this paragraph, unless the negotiations would otherwise be deadlocked.

Article 10 (1). There is no objection to the Japanese amendment to this paragraph.

Article 11 (1). The Department believes the Embassy should forcefully advance the proposition that the protection of this article should be available for all consular personnel, whether or not nationals of the receiving state.

The grant of this immunity from jurisdiction to consular employees who are nationals of the receiving state can be justified on a firm ground. The official acts performed by employees in the exercise of their functions are acts of ... sending state. It can therefore be stated that the immunity in question is not a simple personal immunity of the consular employee, but rather an immunity attaching to the foreign state as such. The minimum immunity needed in order for a consular employee to be able to exercise his functions is the immunity from jurisdiction granted in respect of official acts. The receiving state may, of course, of its own accord grant the consular employees in question any other privileges and immunities. In this connection Article 69 of the International Law Commission's draft convention on Consular Intercourse and Immunities - (13th Session, 1 May to 7 July 1961) provides as follows:

"1. Except in so far as additional privileges and immunities may be granted by the receiving state, consular officials who are nationals of the receiving state shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided for in article 44, paragraph 3, of these articles. So far as these officials are concerned, the receiving state shall likewise be bound by the obligation laid down in article 42.

2. Other members of the consulate, members of their families and members of the private staff who are nationals of the receiving state shall enjoy privileges and immunities only in so far as these are granted to them by the receiving state. The receiving state shall, however, exercise its jurisdiction over these persons in

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such a way as not to hinder unduly the performance of the functions of the consulate."

The Embassy should argue that this Convention would be the vehicle whereby consular employees who are nationals of the receiving state would not be subjected to the jurisdiction of the courts of the receiving state in respect of acts performed in their official capacity.

Article 11 (new paragraph).

It is apparent that the Japanese were aware of Article 69 of the ILC draft which draft is nearly verbatim, in proposing this paragraph. The Department believes, however, that the words "in virtue of the provisions of preceding paragraphs" are not desirable, since the receiving state exercises its jurisdiction by virtue of powers inherent in it, not pursuant to Article 11 (1) and (2), which speak in the sense of exemptions from jurisdiction. With the deletion of these words there would be no objection to the new paragraph.

Article 11 (5). No objection to the Japanese proposal.

Article 12 (2). Despite careful study, the Department is unsure what is behind the Japanese proposal. Since the change seems meaningless, the Embassy may wish to delve further into the logic of not differentiating between direct and indirect taxes for the purpose of this paragraph.

Article 13 (2)a. No objection to the Japanese proposal.

Article 13 (3). It is not believed the Department has characterized the nature of Article 13 taxes as either direct or indirect. The Department would not therefore desire to frame paragraph (3) in the affirmative, since it is not the purpose of a consular convention to say what taxes may be imposed. Rather, it is better to let local law define such taxes, and merely provide exemptions therefrom in the convention.

Article 13 (3)d. If the Embassy does not object to the inclusion of the diesel oil delivery tax, this change is approved.

Article 13 (4)a. No objection to the Japanese proposal.

Article 14 (2). The first change of the Japanese is approved. The Japanese proposed change "forming part of his household" is in accordance with Article 49 of the ILC draft and Article 36 (1) of the Vienna Convention. However, the present Japanese wording of Article 14 (2) is far from what the Department believes would be sufficient clarity. Does the term include adult unmarried daughters, or parents? The Department would prefer, if possible, that the Embassy argue for the previous wording, since it is our view that those persons

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not residing regularly with the consular officer, or not necessarily present for his welfare and comfort, should not be entitled to exemption from customs duties.

Article 14 (new paragraph). The Department approves the addition of this paragraph.

Article 15 (4). Again, the Japanese negotiators have written an article in the negative. While the practical effect of this change is the same as the previous language, it is usual in consular conventions to regulate by granting rights, not by imposing restraints upon the receiving state. In addition, by limiting the article to administrative authorities, it might be construed as permitting authorities who are not "administrative" to prevent access to the consular officer. It is proposed that the Japanese be drawn out further in their real reason for proposing this change. It is probable that the Department could approve this Japanese proposal with the deletion of the word "administrative".

Article 16 (1). The Embassy may wish to inquire what is an "undue delay", as opposed to a "delay". The word "undue" was omitted to alleviate problems of definition, since otherwise in any particular circumstance there could be a delay, but it could be said not to be undue. Although the Japanese change will make the right of immediate visitation more prone to controversy, the Department is not ready to insist upon the earlier text. The Embassy may wish to consider the effect of this change, if any, upon its activities, and act accordingly in future negotiation with the Japanese side.

Article 17 (1)e. There is no objection to the substance of the proposed change of the Japanese negotiators. However, to ensure that the phrase "any person in the receiving state in accordance with . . ." at the end of the sentence of (iii) modifies (i) and (ii) as well, it should be set off separately, as follows:

" . . .

(ii) take evidence, on behalf of the courts of the sending state, voluntarily given by, or

(iii) administer oaths to any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state."

With respect to the Japanese query concerning the "special arrangements" provision of Article 17 (1)g of the US-UK consular convention, the Japanese can be advised that no such arrangements have ever been made. Since the provision never was implemented, it was not felt necessary to propose it

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to the Japanese. The department is not aware of a corresponding section in the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany. In view of the Department's approval of the Japanese changes to Article 17 (1)e, however, further discussion of this matter seems unnecessary.

As substantiation for this change, the Embassy is requested to furnish all available information it might have to the Japanese assertion in the first full sentence of Page 12 of Enclosure 2 to Despatch No. 185.

Article 17 (4)b. The Department would not object to the deletion of this paragraph.

New Estates Article. It is noted that with the Japanese counter-proposal, the obligation to notify is greater, in that it would have to be made for any deceased person, not merely a deceased person without any known heir or testamentary executor in the receiving state. The negotiators should state that it would appear to the Department the Japanese counterproposal goes too far, since if the deceased person has a local executor or near relative, that person should do the necessary notifying. However, with the "if practicable" modification of the duty, the Japanese change seems to be without much substance, and hence would not be too objectionable, although open to a variety of administrative interpretations.

Japanese Questions on 2(a) and (b) distinction:

The answer to the Japanese question posed at page 15 of Enclosure No. 2 to Despatch 185 is that FYI, the American Bar Association insisted upon the inclusion of the phrase "resident of the receiving state at the time of death" in 2(b). End FYI. Actually, the difference might be explained in that 2(a) relates only to preservation of personal assets, but that 2(b) encompasses real property. It was believed that administration of an estate of a national of the sending state should not be given to a consular officer of the sending state when such nationals may have resided in the receiving state for many years, and acquired considerable assets, including real property.

Since the Department's instruction of A-368 of April 5, 1960, there has been a further minor change at the instance of the legal profession to 2(b) which is the deletion of the words "or upon the petition of heirs having the majority interest in such estate;." This phrase was originally made a part of the recent revision to the estates articles to meet the objection that while a consular officer might have himself named as administrator, that the principal heirs may have some other person in mind. On further reflection, however, the phrase was considered to be so uncertain in its wording as unnecessary litigation would probably result. The Japanese negotiators should be informed that this is a necessary technical change to the estates article if United States Government acceptance of the convention is to be possible.

Article 21 (1).

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Article 21 (1). No objection to the Japanese proposal. The proposal is in accord with Sec. 252 (a) and (b) of the Immigration and Nationality Act, 8 U.S.C. 1282.

Article 21 (2). No objection to the Japanese proposal.

Article 22 (3). No objection to the Japanese proposal.

Article 23 (2) and (b). Since both the words "territorial waters" and "internal waters" have definite meanings ascribed to them in other contexts, and both differ in their scope, it is proposed that the word "water" not be modified by either term, much as is done in Article 7 of the short form. Should this explanation prove insufficient for the use of the Embassy's negotiators, it will be elaborated on in the future. There is no objection, however, to the addition of the words "ports or" or "who are not nationals of the receiving State."

Article 24 (1). No objection to the Japanese proposal.

New Article on Aircraft. It is noted that the Japanese negotiators have adopted a principal part of Article 7 (5) of the Short Form Draft. The Department would not object to the addition of this new article.

New Article on Limitations. (1) The Japanese negotiators have utilized Article 15 of the short form as the basis for this article. No objection to this Japanese proposal.

(2) While the Department feels quite strongly that the privileges of Articles 7 (1), 8 (4) and 12 (2) are for the benefit of the respective High Contracting Parties, as a matter of fact the United States Government does not, with respect to its establishments in Japan, place a national of the receiving state or an alien permanent resident or a part time officer in charge of a consular office, or procure housing for such persons. The Department believes this policy will change in the foreseeable future, and if the Embassy has no further thoughts on the matter, there is no objection to the Japanese proposal.

New Paragraph. No objection to this Japanese proposal. In fact, for some time the Department has been opposed to having agreed minutes as a part of the Convention, since they also would be transmitted to the Senate for its advice and consent. The Embassy could seize upon this and other opportunities below to suggest that all agreed-upon minutes having a substantive character be integrated into the body of the Convention. If the Japanese appear receptive to this suggestion, the Embassy is authorized to negotiate ad referendum, such as incorporation of material.

Protocol (1).

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Protocol (1). This proposed Japanese change is not acceptable to the Department. See the discussion above on Article 1 of the Convention.

Protocol (2). The Department's comments upon this item are still in the course of preparation, and will be supplied as soon as agreement is reached.

Protocol (3). The Department does not fully understand why Article 13 (1) is not also made a part of the New Article on Limitations. The Japanese reasoning here should be more fully explored.

Protocol (5). The Department would not object to the deletion of paragraph 5 of the Protocol, since the Vienna Convention on Diplomatic Relations would cover such matters adequately when it enters in force for both countries.

Protocol (6). Perhaps the Japanese side does not appreciate the scope of this paragraph. It was designed to effectuate tax exemption for immovable property owned by the sending state and used either for embassy purposes or for residences of embassy officers or employees. While Japan may be able to provide such tax exemption on the basis of reciprocity or otherwise, property of the Japanese Government in the District of Columbia other than the Embassy and residence of the head of mission would be taxed in the absence of such a provision. The Vienna Convention would also not help, since its tax exemption only applied to the embassy and the residence of the head of mission.

The Department strongly desires this paragraph to achieve tax exemption in Japan for the property covered thereby, as well as to be able to provide similar treatment for the Japanese in the District of Columbia.

Agreed Minutes Article 2 (10). This proposal is not acceptable to the Department. Definitions in such a case are perilous and, in the view of the Department, should be left to ad hoc determinations as the need arises. As a practical matter, the duties of these positions overlap and, while perhaps necessary for internal Japanese purposes, would be hard for the United States Government to justify for its own personnel.

Agreed Minutes - Article 6. No objection to the Japanese proposal if it were incorporated into Article 6. See the discussion above.

Agreed Minutes - Article 11. No objection to this Japanese proposal, but it should be made a portion of Article 11. In this connection, as well, the Embassy could discuss the feasibility of including all substantive agreed minutes as a part of the Articles themselves.

Agreed Minutes - Article 13 (2)a. Since the Japanese negotiators have not fully explained the reason for this proposed change, the Department does not believe it to be justified. Could it be that the proposed minute is a device whereby the tax exemption of Article 13 (2)a could be limited administratively

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by the Japanese to those vehicles which it desires to issue consular number plates? If so, this would appear to be an undesirable limitation upon Article 13 (2)a. As the Embassy correctly observed, also, there may be no provision in the laws of the several states for the granting of consular number plates.

Agreed Minutes - Article 17 (1)e. The Japanese negotiators should be requested to provide a more full explanation for this proposed minute.

Agreed Minutes - Article 23 (2). There is no objection to the addition of the words "or immigration" or "ports", but the words "or internal" should be deleted in line with the discussion at Article 23, above.

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